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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 272

MARY WALL KIRBY ET AL.,
Petitioners,

vs.

HOUSTON OIL CO. OF TEXAS ET AL.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, 9TH SUPREME JUDICIAL DISTRICT OF TEXAS, AND AUTHORITIES IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Mary Wall Kirby, et al., present this application to your Honors for Writ of Certiorari to review and correct the decision rendered against them by the 9th Court of Civil Appeals, in the case styled as in the above Caption, as Appellants vs. Houston Oil Co., of Texas et al., respondents, as appellees, and by the Supreme Court of Texas, which refused to review the action of said Court of Civil Appeals on application for writ of error, its final order

being entered on a motion for rehearing on June 11th, 1947; and for cause petitioners present:

I

Statement of the Case

The petitioners, residents of Bandera County in west Texas, claiming as owners 19 acres of valuable mineral land in Hardin County, east Texas, sued respondents as trespassers to recover it. As the widow and children of the grantee, Dr. H. S. Kirby, they claimed title by warranty deed dated in 1904 executed to him by two grantors, Louisa J. Frazier and her husband W. S. Frazier. (See deed, R. 17-18). It was a part of the Frazier 160 acre homestead tract in a large survey. This case was decided against them based upon the legal effect, as *res judicata,* of a default or *nil dicit* judgment rendered in 1899 (five years before the deed in question) in favor of the Respondents' predecessors, Texas Pine Land Association, against W. S. Frazier alone; the courts below holding that the title was divested out of both the grantors by the judgment against one of them. (See copy of judgment, R. 15-16).

The Fraziers were each separately invested with equal estates which, under the law of Texas, were indivisible and inseparable in the 160 acre tract on which they had lived, as their homestead, for 25 years before the judgment in 1899, and for 30 years before they sold a part of it to Dr. Kirby under whom petitioners hold.

They had settled on the land the latter part of 1873 or first part of 1874 and had continuously used and cultivated a portion of the 160 acres, raising a family of nine children and claiming title thereto under Article 5510 of the Texas statute of 10 years limitation.

The holders of the technical paper title to the league of land upon which this homestead was situated were non-

residents, and were not parties or privies to the judgment against Frazier.

No attempt was ever made to enforce this judgment or to disturb in any wise Frazier's possession. Twenty-six years after the judgment was rendered—21 years after petitioners' deed was made—respondents recovered a judgment against the owners of the superior title to the league, on a verdict based on ten years' adverse possession under recorded muniments, purporting to be a junior chain of title. (R. 31-2).

Neither the Fraziers nor these petitioners were parties thereto nor had anything to do with that proceeding. It was produced by respondents as defense to this suit. The Frazier family continued this occupancy of the homestead, less the 19 acres sold to Dr. Kirby, until Frazier's death in 1912 and his wife's death some 10 years later.

The first attempted encroachment on petitioners' tract, on which they regularly paid all taxes but did not take pedal possession thereof, was some three years prior to the filing of this suit, when respondent, American Republic Oil Co. erected a derrick and drilled an oil well thereon.

The trial court on motion of respondents instructed the jury to return a verdict for them, and judgment was entered accordingly.

The case was appealed to the 9th Court of Civil Appeals, and there affirmed upon the ground that the judgment against Frazier alone had "the effect of divesting title out of W. S. Frazier and wife" (L. J. Frazier); and therefore destroyed the title conveyed by the Fraziers in 1904 to Dr. H. S. Kirby.

Assignments of Error challenging the action of the lower court upon any theory of the case developed under the facts, were presented on the appeal, and the Court refused to consider the same, using the following language:—"The view

we take of the effect that must be given to the judgment in Cause # 570, styled W. S. Frazier v. Texas Pine Land Association, renders it unnecessary for us to pass upon any other points presented." (R. 9). And again:— "Being of the opinion that said judgment divested such title as W. S. Frazier and wife might have had to the 19 acres here involved, and no contention being made that any title had been acquired by appellants to said 19 acre tract other than that of W. S. Frazier and wife since the date of said judgment, it follows that the trial court was fully authorized to instruct a verdict against the appellants. Should there be error presented by the other points presented by appellants they would necessarily be harmless error as appellants showed no title to the mineral estate sued for, and a take nothing judgment would be as effective and preclusive against appellants as the judgment entered by the Court."

The petitioners are presenting under the third division of this paper the Assignments of Error addressed to that feature of the case, which assignments the Court of Civil Appeals refused to consider, and overruled.

Since the Supreme Court under Texas statute (Vernon's Ann. Stat. Vol. 3 p. 256) had final jurisdiction to review the case, petitioners seasonably applied to that Court for Writ of Error (R. 13). It was "Refused without comment" on April 30th, 1947 (R. 55).

Thereupon petitioners filed a printed motion for Rehearing. It is brought here in full; as are also the original application for the writ of error, and Respondents' Answer thereto (R. 56). Because the Motion fully presents and develops the issue here, we are lodging with the record ten printed copies for the Court's inspection, as well as copies of the other two documents.

The chief constitutional question here raised was presented to that court in these terms:—

> "First Point" The petitioners, standing in the shoes of both parties who owned in unseverable and inseparable title, interest and estate, the land in controversy, are clothed with the rights of both. And the plea of res adjudicata under the judgment against Frazier alone, is void of effect as to the title to that homestead and the portion thereof here involved. To hold that the wife was bound by that judgment against her husband, and that thereby the homestead itself was destroyed, is to deprive such person whose estate is taken of the right of due process of law, without such person ever being brought before the court.
>
> "It is in express violation of Art. 1, Section 19 of the Texas Constitution, which reads: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities * * * except by the due course of the law of the land."
>
> "And it is also violative of the Federal Constitution, Art. 14, Sec. 1, that: "no State shall 'deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' "

The motion also pointed out that the action of the Court of Civil Appeals was also a denial of the "equal protection of the law" guaranteed by the Constitution, in that from the earliest to the latest decisions the Supreme Court of Texas had held that such judgments, in cases where parties owned their homestead, against a husband alone, were null and void—not only against the wife, not party to such suits, but also as against the husband himself. Such decisions uniformly have so construed the Constitution and statutes of Texas affecting homesteads. These decisions were cited, quoted from and analyzed in the Motion for Rehearing in the Supreme Court of Texas, pp. 17 to 29; (R. 73-85).

The order of the Supreme Court entered June 11th, 1947 was as follows:

"June 11, 1947.

"No. A-1214. On Re-hearing of the case Mary Wall Kirby *vs.* Houston Oil Co. et al. from Hardin, 9th District.

The motion for Rehearing herein filed by the petitioners, having heretofore been submitted to the Court, and after due consideration of same, it is ordered that the said motion be, and is hereby overruled."

The record was returned to the Court of Civil Appeals for final enforcement of its decree.

A stay of Mandate was then granted to enable petitioners to apply for this Writ of Certiorari.

Grounds of Jurisdiction and Reasons for Granting of the Writ

First Ground

It being the established law of Texas laid down in Art. 16, Section 50 of the Constitution, and in the Homestead provisions of Arts. 1300-4618 of the Statutes, and uniformly construed and declared by the Supreme Court of the State that the title to land acquired and held as homestead is an equal, invested, inseparable estate in each party, and cannot be divested, annulled, conveyed or encumbered by the separate action of either, in voluntary or involuntary proceedings, nor can it be done by any agency of the State in the form of a judgment, such judicial action against one alone being null and void as to both:

The Courts below therefore, erred in holding that petitioner's title was annulled and destroyed by the default or "nil dicit" judgment entered against W. S. Frazier alone, without the presence as a party to the suit of his

wife, L. J. Frazier; and that it was *res judicata* of the title to the portion of the homestead vested by their joint deed in Dr. Kirby.

Such decision is in violation of Art. 14, Section 1 of the constitution of the United States, and is a denial to these petitioners of due process of law.

Explanatory Statement

Article 16, Section 50 of the Texas Constitution reads as follows:

> "The homestead of a family shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall be ever valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust deed, or other lien, shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void."

Article 4618 of the Texas statute on Husband and Wife, relating to homestead rights, reads as follows:

> "Art. 4618. 4621, 2967, 2651. Sale of Homestead.
> "The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint con-

veyance of both the husband and the wife, except where the husband is insane or has permanently abandoned the wife, in which instances the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate property."

Article 1300 of the Texas statutes relating to conveying of the Homestead rights, reads as follows:

> "Art. 1300. (1115. 636. 560) Conveyance of Homestead.
>
> "The homestead of the family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance, and signing her name thereto, and by her separate acknowledgement thereof taken and certified to before the proper officer, and in the mode pointed out in Articles 6605 and 6608."

The Supreme Court of Texas in the following cases has uniformly held that the homestead is an estate in land: *Stevens* v. *Coburn,* 213 S. W. 925 (opinion by Greenwood); *Green* v. *White,* 153 S. W. 2d. 525 *Rutledge* v. *Mitchell,* 95 S. W. 2d 1135, as follows:

> "Homestead estate is dependent upon some title or interest in property, and does not exist as separate estate in property, independently of such title or interest." (McLendon, C. J.)

Sayers v. *Pyland,* 161 S. W. 2d 769 (Alexander, C. J.):

> "Owner homestead right in property can never rise any higher than the rights, title or interest that he owns in the property attempted to be impressed with a homestead right."

Plough v. *Moore,* 56 S. W. 2d 68:

> "One claiming homestead exemption should allege the facts and not conclusions," to establish homestead. The necessary fact, of course, being the allegation of title.

Article 5510 of the Texas civil statutes relating to ten years adverse possession reads as follows:

> "Art. 5510. (5675-5676) (3343) Ten years' possession.
>
> "Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument."

The Supreme Court of Texas early laid down the law, in *Campbell* v. *Elliott,* 52 Tex. 151, as follows:

> "The homestead estate * * * unlike an estate by joint tenancy, can be vested in but two persons only who are regarded as but one in law; who are seized not of undivided moiety of the whole, but each takes in entirety * * * who cannot alienate separately but must alienate jointly; who cannot sever at pleasure but hold an estate which, when it remains theirs, is unseverable; who cannot partition unless in a di-

vorce proceeding severing their matrimonial relations, and who have not the right of survivorship, but upon the decease of either spouse the other continues to hold the entire homestead claim as such."

Second Ground

When the Frazier judgment was rendered in 1899 it was void under the constitution and statutes of Texas as construed by the Texas Supreme Court in uniform decisions; and under the case of *Mexia* v. *Lewis,* 21 S. W. 1017, decided in 1893 on facts identical with the case at bar. When, therefore, in 1912 that Court of Civil Appeals, with an entirely new personnel, ruled to the contrary in an uncontested appealed case styled *Breath* v. *Flowers,* 95 S. W. 26—unapproved by the Supreme Court and contrary to its decisions and to all other Courts of Civil Appeal, it did not and could not by retroactive effect render valid a "judgment" void under the law then existing, so as to impeach and destroy *ex post facto,* petitioners' title: and the holding that it did have that effect in this case is a violation of the 14th Amendment of the Federal constitution, and an arbitrary denial to these petitioners of due process of law and equal protection of the law.

Supporting Statement

See analysis in Motion for Rehearing, *Breath* v. *Flowers, supra,* on pages 6 and 7 (R. 6-7); and other appellate court cases on pages 19 to 29 (R. 75-85).

The Court of Civil Appeals in this case said: "Appellants have cited many cases in support of their contention that Mrs. L. J. Frazier was a necessary party to the suit in question in order for the judgment to have any validity, including the case of *Mexia* v. *Lewis et al.,* 21 S. W. 1016, which seems to directly support the contentions here made by them." Then follows the statement that the Court in 1912 ruled contrary to the *Mexia-Lewis* case in *Breath* v.

Flowers et al.; concluding that therefore the judgment against Frazier alone divested Mrs. Frazier of her title, and thus rendered petitioners' conveyance void of title.

The established law of Texas is that the identity and separate rights of the two persons existing before marriage, remain inviolate thereafter as to homestead and estate. Neither by voluntary or involuntary process can the rights of one be taken away by the other, nor can their united rights be affected thereby. The separate proceeding is void as to both. (See Motion for Rehearing, p. 17; 25-26; 28, 29, 32; R. 26).

The Beaumont Court of Civil Appeals by its former Chief Justice in deciding the same question here, held that the holder of title under such judgment "Acquired no rights against (the wife) Lucy Smith's claim of homestead by its judgment against (the husband) Monroe Smith, to which she was not a party." (*Smith* v. *Waverley,* 70 S. W. 2d 201; approved by Writ of Error refused by the Texas Supreme Court).

To the same effect is *Harper* v. *Stewart,* 179 S. W. 277, cited and approved in the *Smith* case, *supra.* (Quoted in Motion, pp. 25-26) (R. 81-2).

To the same effect is the recent case of *Behrens* v. *Behrens* (1945), 186 S. W. 2d 687; in which the language of the Court is as follows:—

"The wife was not a party to the suit or the oral agreement made in open court to render judgment divesting the husband of his inheritable or other interest in the land and consequently, she is not bound by either the judgment or the agreement to enter such final judgment under the aforementioned rule controlling such matters. When the homestead interest of the wife became thus involved in the suit, she thereby became a necessary party to the suit, to the oral agreement made in open court to later enter the judgment divesting her husband of all title or interest in the land, and

to the agreed judgment itself. We further hold that the homestead claim of the wife could not be conveyed or divested by Counsel for her husband in this case. She was not a party to the suit or settlement agreement and the homestead cannot be conveyed by any such method.

"These facts as alleged and testified to clearly raise the homestead right of the wife in the premises so occupied and used for a long period of years. This homestead of the wife could not be defeated in a suit to which she was not a party. Jergens v. Schiele, 61 Tex. 255; Cooley v. Miller, 227 S. W. 1085." (Writ of Error refused by Supreme Court).

In a recent case, 132 S. W. 2d 552, the principle is reaffirmed by the Texas Supreme Court in these words:—

"Until the abandonment takes place the husband's deed alone conveys nothing, and cannot be held as a restriction on the right of or as an impediment to the conveyance of the homestead to another in the constitutional and statutory way."

In *Harper* v. *Stewart, supra,* the Court in a homestead case held the judgment against the husband alone void, quoting the *Mexia-Lewis* decision as follows:—

" 'As to all of the land which was used and occupied as a homestead by Lewis and wife at the time of the institution of the first suit, the judgment obtained against Lewis in that suit was inoperative and of no effect as to either Lewis or his wife. Mrs. Lewis was not a party to that suit and the homestead right was not put in issue. Whatever may be said of the character of the homestead estate, it is considered as an entirety, and the interests of the husband and wife are not separable. The judgment against Lewis could have no prospective effect, and if at the time of its rendition it was inoperative, it could not be put into opera-

tion by a subsequent abandonment of the land as a homestead.'

"To the same effect is the case of Campbell v. Elliott, 52 Tex. 151."

In *Smith* v. *Waverly, supra,* decided in 1940, holding the judgment against the husband alone void in a homestead case, the Court said:—

"The rule in Texas is that a wife is a necessary party to a foreclosure suit brought against the husband alone, provided there is any defense that the wife *could* have urged, growing out of her homestead rights, *which would have defeated* the action."

In disposing of the case the Court said:—"As the judgment foreclosing the vendor's lien against the homestead was absolutely void as against Lucy Smith, it was also absolutely void as against her husband, Monroe Smith. Mexia v. Lewis, supra; Martin v. Astin, supra; Harper v. Stewart, 179 S. W. 277, supra; Seay v. Fennell, 39 S. W. 181." (Writ of Error denied).

It is not strange, therefore, that among twelve different Courts of Civil Appeals in Texas, in an uncontested case an erroneous opinion of the law should occasionally vary from all the other appellate tribunals. If the victim of such error as Flowers was, saw fit to submit when the remedy was available to correct it, but not used—that incident neither changes the jurisprudence of the State nor destroys the rights of other citizens as was done here.

Like the *Frazier* case, Flowers and wife had acquired title to 160 acres as a homestead. The technical land owners of the large survey, suing others, including Flowers without his wife as a party, recovered judgment against him. Afterwards Flowers and his wife sought an injunction to prevent ouster from their homestead under this judgment. The trial court, under the established law of the State, granted

the injunction, holding the judgment void. The defendants appealed to the Galveston Court of Civil Appeals. The record shows that Flowers and wife did not appear by counsel or contest the appeal. The uncontested case was reversed and there it ended.

Respondents in their answer to petitioners in the Supreme Court (R. 41) said:—

"In answer to the contention * * * we simply refer to the opinion in Breath et al v. Flowers, et al., supra, wherein the Court held that title had vested in Flowers and wife at the time of the institution of the suits against Flowers, to which his wife was not a party, but that, nevertheless, the plea of homestead would have been no defense to such suits, that the wife was not a necessary party thereto and that the judgments therein were binding upon her and an effectual bar to her rights."

In other words the equal, invested title and estate of the wife is divested out of her by a judgment against another. That is this case and that was the *Flowers* case. Flowers submitted. The petitioners have not submitted—even if the Court of final review in Texas refused to correct the error and protect them in their constitutional rights, both state and federal.

The case presents one of two alternatives: either (1) the shield of protection forged by the constitution and statutes of Texas for the millions of homesteads in the State against the acts of ignorance, negligence or fraud of husbands, has been shattered and destroyed by the judicial orders in this cause; or (2) these litigants have been arbitrarily denied the legal right and protection vouchsafed and granted to all other persons in like status.

Authorities

(cited to the lower court)

Hansberry v. *Lee* (1940) 85 L. Ed.. U. S. 22, reversing an Illinois Supreme Court decision on certiorari granted (84 L. Ed. 1002), in which the Supreme Court of the United States decided a question identical in principle with that presented in this record.

The Illinois Supreme Court by adjudicating that defendants in suit to enjoin breach of agreement restricting the use of certain land were bound by a judgment rendered in an earlier litigation to which they were not parties, deprived them of "due process of law," where agreement did not purport to create a joint obligation or liability, defendants in earlier litigation, which was a suit to enforce agreement, were not treated by pleadings or decree as representing others, or as foreclosing by their defense the rights of others.

In that case Mr. Justice Stone said:—"The question is whether the Supreme Court of Illinois by its adjudication that petitioners in this cause are bound by a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the 14th Amendment." (p. 25).

The fourth syllabus is as follows:—"The enforcement of a judgment against the person or property of one not designated as a party, nor made a party by service of process, violates the due process clauses of the 5th and 14th amendments." (*id.* p. 22).

And again:—"State courts are free to attach such descriptive labels to litigations before them as they may choose, and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the

United States. But when the judgment of a State court ascribing to the judgment of another court the binding force and effect of *res judicata* is challenged for want of due process, it becomes the duty of this court to examine the course of procedure in both litigations, to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Indemnity Ins. Co.* v. *Rupp*, 225 U. S. 261.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party, or to which he has not been made a party by service of process (citing cases). . . . A judgment rendered under such circumstances is not entitled to the full faith and credit which the constitution and statutes of the United States . . . prescribes."

In *Postal Tel. Cable Co.* v. *Newport*, a Kentucky case, 247 U. S. 464, 62 L. Ed. 1215, the Court held that the opportunity to be heard is an essential requisite of "due process of law" in judicial proceedings. And as a State may not consistently with this amendment enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot without disregarding the requirements of "due process of law" give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

It is established by the adjudications of the U. S. Supreme Court that a state may not, by its Legislature or its Courts, adjudicate the rights of a citizen of the United States, without subjecting such person to the jurisdiction of the court assuming to affect his right, by process sufficient in fact to bring such person before the Court, and that an adjudica-

tion in the absence of such prerequisite affecting his rights is null and void.

There are two striking illustrations of this:

Scott v. *McNeal,* 154 U. S. 34. The State of Washington had a statute providing that after an absence from the State for a period of seven years, under circumstances suggesting that he was unheard of and therefore dead, such person should be deemed to be dead and his estate be subject to administration and disposal as a deceased person.

Under this provision a man named Scott disappeared from his home and was not heard from for seven years, and his estate was administered upon by the probate court in regular form, and his property was sold and transferred to another. Shortly after that time he returned home and demanded that the purchaser of his property surrender it to him. That was refused and he brought suit to recover it. The District Court of the State decided against him. He appealed to the State Supreme Court, which affirmed the judgment of the lower courts, holding that under the statute law of the State and the decision of the lower court he was correctly adjudicated to be dead.

He applied to the Supreme Court of the United States upon the ground that he had been deprived of his property "without due process of law," although, in form, due process had been complied with in every respect. The Supreme Court decided that the man was still alive, and that the power of the Court to adjudicate him dead and appropriate his property was a violation of "due process of law," and ordered the State authorities to deliver him his property, reversing the decision of the Supreme Court of the State.

Coe v. *Armour Fertilizer Works,* 59 L. Ed. U. S. 1027: This is another case of similar nature from Florida. That State had a statute that the stockholders of corporations

should be bound by a judgment rendered against the corporation alone; and a citizen of Florida, without being in the case as a defendant, but being a stockholder of the defendant corporation, had his property levied upon by writ of execution. The Supreme Court of Florida affirmed the judgment of the lower court sustaining the court's jurisdiction and the liability of the stockholder on the judgment against his corporation. The United States Supreme Court held that the entire proceeding was void, as violative of "Due process of law," and discharged the stockholder from the penalties of the judgment.

Great Northern Rwy. Co. v. *Sunburst O. & R. Co.*, 287 U. S. 358-367, 77 L. Ed. 360. The point that the proposition that the constitutional questions here presented were timely raised and duly presented in the lower court is established by the decision of this Court in the above cited case.

III

In the event your Honors grant the Writ of Certiorari, the Court is asked to consider and decide, upon the merits of the case the following Assignments of Error, duly presented below and overruled.

Assignments of Error

The Court of Civil Appeals, and the Supreme Court in refusing the writ of error, erred:

1

In affirming the judgment of the trial court on the ground that appellants showed no title to the mineral estate sued for by them.

2

In failing to find and hold that appellants are entitled to a recovery of the property sued for by them on the title thereto which they established by undisputed evidence.

3

In affirming the judgment of the trial court on the ground that the judgment rendered on September 26th, 1899, by the District Court of Hardin County, Texas, in cause No. 570, styled *W. S. Frazier* v. *Texas Pine Land Association,* divested W. S. Frazier and his wife of the title to the property covered by that judgment.

4

In failing to rule that the adverse possession of Frazier and his wife to their 160 acre homestead tract was not interrupted by the entrance of tenants of E. A. Irvin upon other parts of the Brooks league.

5

In failing to rule that the title asserted by appellants herein is not defeated by the attempted reservation of oil and minerals in the deed dated June 9, 1902, from Houston Oil Co. of Texas to W. S. Frazier.

6

In failing to rule that the appellees have no title to the property herein sued for, under the three years statute of limitation.

Conclusion

It is therefore respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory power, and petitioners pray the Court to grant the writ of

certiorari, and thereafter to review and reverse the decision of the Court below. And they pray for such other relief as they may be entitled to.

Respectfully submitted,

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(1888)